No. 90-867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

POWELL DUFFRYN TERMINALS, INC.,
Petitioner,
v.
PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., FRIENDS OF THE EARTH and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AMERICAN IRON AND STEEL INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, CHEMICAL INDUSTRY COUNCIL OF NEW JERSEY, AMERICAN CYANAMID COMPANY, BORDEN, INC., CHEVRON CORPORATION, THE COCA-COLA COMPANY, DRESSER INDUSTRIES, INC., HERCULES, INCORPORATED, JERSEY CENTRAL POWER & LIGHT COMPANY, MONA INDUSTRIES, INC., MURPHY OIL, USA, INC., PHELPS DODGE CORPORATION, SANDOZ PHARMACEUTICALS CORPORATION, SMITHFIELD FOODS, INC., TYSON FOODS, INC., USX CORPORATION, UNIVERSAL TOOL & STAMPING CO., INC. and WARD TRANSFORMER CO., INC. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

American Iron and Steel Institute, *et al.*, respectfully move this Court for leave to file a brief *amici curiae* in this case in support of the petition for a writ of certiorari filed by Powell Duffryn Terminals, Inc. The petition seeks review of the court of appeals' decision in *Public Interest Research Group of New Jersey, Inc., et al. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990) (reproduced as Appendix A to the petition). Counsel for the petitioner has consented to the filing of a brief *amici curiae* by the American Iron and Steel Institute, *et al.* Counsel for respondents Public Interest Research Group of New Jersey, Inc., and Friends of the Earth did not consent.*

* As reasons for withholding consent, respondents' counsel stated that the brief *amici curiae* was not necessary, that respondents would not be able to reply to *amici*, and that respondents would not object to submission of a brief by *amici* if the Court grants the petition and hears the case on the merits.

1. *Amicus* American Iron and Steel Institute ("AISI") is a trade organization of manufacturers, processors and other producers of iron and steel and related products. All AISI members are regulated under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988) ("Clean Water Act" or "the Act").

Amicus Chemical Industry Council of New Jersey ("CIC") is a trade organization composed of 105 chemical and allied product manufacturers with facilities located throughout the state of New Jersey. CIC member companies produce a broad range of materials used in the agriculture, pharmaceuticals, manufacturing, construction, mining, textiles, flavors and fragrances, precious metals and research. Nearly all of CIC's members are regulated under the Clean Water Act.

Amicus National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of over 13,000 companies and subsidiaries. NAM's members produce over eighty percent of the manufactured goods produced in the United States. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. Thousands of NAM's members and affiliates are regulated under the Clean Water Act.

Amici also include a number of individual companies in chemical production, oil exploration, production, refining and marketing, pharmaceuticals, production of steel and other metal products, tool and heavy equipment manufacturing, food products, mining, electrical equipment and electric utilities. Each of the individual company *amici* are subject to regulation under the Clean Water Act.

2. Like petitioner, each of the *amici* is a holder of (or is an organization many of whose members hold) one or more permits issued under the National Pollutant Discharge Elimination System ("NPDES") established under section 402 of the Clean Water Act, 33 U.S.C. § 1342. These permits are administered by the U.S. Environmental Protection Agency ("EPA") and regulate the dis-

charge of pollutants to navigable waters of the United States. This system of permits is the result of the 1972 amendments to the Act, which required the establishment on an industry-by-industry basis of generally applicable effluent limitations that restrict the types, quantities and concentrations of pollutants that may be discharged. These effluent limitations are enforced through individual NPDES permits. *See Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 52-53 (1987); *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 203-08 (1976). Section 505 of the Clean Water Act, 33 U.S.C. § 1365, authorizes NPDES permit enforcement in private enforcement actions. This case involves a suit under section 505.

Amici are committed to the goals of the Clean Water Act. To that end and in coordination with state and federal regulatory authorities, *amici* (or member companies) have spent vast sums to upgrade and enhance water pollution control at their facilities. Nevertheless, *amici* (or member companies) have been (or presently are) defendants in enforcement suits under section 505 of the Clean Water Act, or have received notice, pursuant to section 505(b)(1)(A), that an individual or organization intends to file such a suit.

3. The fundamental issue raised by the petition in this case is the scope of the constitutional standing requirements applicable to citizen plaintiffs under section 505 of the Clean Water Act. The court of appeals adopted a new standard for standing in Clean Water Act cases that allows a section 505 plaintiff to establish standing based solely on a showing of a violation of defendant's NPDES permit, without a demonstration that plaintiff's alleged injury was caused by the defendant's conduct.

Amici are directly interested in this case because the court of appeals' misinterpretation of constitutional standing requirements for Clean Water Act citizen suits would greatly expand citizens' entitlement to bring suit under the Clean Water Act, as well as other environmental statutes. In fact, the expansion of traditional constitutional

standing requirements in environmental suits was the predicate given by Judge Aldisert for his concurring opinion below. *See* 913 F.2d at 84.

The issue raised by the instant petition for a writ of certiorari directly affects *amici* and raises important issues regarding constitutional requirements for standing. This is true not only because *amici* (or their members) are subject to regulation under the Clean Water Act and private enforcement actions under section 505, but also because the court of appeals' decision implicates similar enforcement suits under a number of other environmental statutes. The decision below seriously prejudices *amici* by announcing a standard of broad applicability that would permit litigation by persons who, under the standards previously applied by this Court, would not have standing to sue.

In the accompanying brief *amici* address these broad issues. *Amici* do so from the perspective of diverse organizations and industrial entities whose concerns regarding the decision below transcend this case. *Amici* believe that they can effectively contribute to the Court's understanding of the broader ramifications of the court of appeals' decision.

In view of the foregoing, *amici* American Iron and Steel Institute, *et al.*, respectfully request that they be permitted to file the accompanying brief *amici curiae* in support of petitioner Powell Duffryn Terminals.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF AMERICAN IRON AND STEEL INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, CHEMICAL INDUSTRY COUNCIL OF NEW JERSEY, AMERICAN CYANAMID COMPANY, BORDEN, INC., CHEVRON CORPORATION, THE COCA-COLA COMPANY, DRESSER INDUSTRIES, INC., HERCULES, INCORPORATED, JERSEY CENTRAL POWER & LIGHT COMPANY, MONA INDUSTRIES, INC., MURPHY OIL, USA, INC., PHELPS DODGE CORPORATION, SANDOZ PHARMACEUTICALS CORPORATION, SMITHFIELD FOODS, INC., TYSON FOODS, INC., USX CORPORATION, UNIVERSAL TOOL & STAMPING CO., INC. and WARD TRANSFORMER CO., INC. IN SUPPORT OF PETITIONER

This brief *amici curiae* is submitted in support of petitioner Powell Duffryn Terminals, Inc. *Amici* believe that the decision below of the court of appeals, *Public Interest*

Research Group of New Jersey, Inc., et al. v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3d Cir. 1990) (reproduced as Appendix A to the petition), incorrectly interprets the requirements for standing under Article III of the Constitution and disregards the decisions of this Court that identify the requirements for constitutional standing.

The petitioner has consented to the filing of this brief and petitioner's letter of consent has been filed with the Clerk of the Court. Respondents Public Interest Research Group of New Jersey, Inc., and Friends of the Earth ("NJPIRG") have not consented, and *amici* have simultaneously filed a motion for leave to file this brief.

STATEMENT OF INTEREST OF *AMICI*

Amici consist of several voluntary business associations and individual companies representing a broad spectrum of industry in the United States.

Amicus American Iron and Steel Institute ("AISI") is a trade organization composed of manufacturers, processors and other producers of iron and steel and related products. Virtually every member of AISI is subject to regulation under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988) ("Clean Water Act" or "the Act").[1] Many AISI members have been defen-

[1] The 1972 amendments to the Clean Water Act establish a permit system, the National Pollutant Discharge Elimination System ("NPDES"), that regulates the discharge of pollutants to navigable waters of the United States. These permits contain effluent limitations restricting the types, quantities and concentrations of pollutants that may be discharged. The permit system is administered by the U.S. Environmental Protection Agency ("EPA"). *See* § 402 of the Act, 42 U.S.C. § 1342; *see also Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 52-53 (1987); *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 203-08 (1976). Section 308 of the Act, 33 U.S.C. § 1318, requires an NPDES permit holder to self-monitor compliance with NPDES permit requirements. Monitoring reports

dants in a citizen suit, like the instant case, under section 505 of the Clean Water Act. AISI presents the views of its members on issues of law and public policy which are of concern to them.

Amicus Chemical Industry Council of New Jersey ("CIC") is a trade organization representing 105 chemical and allied product manufacturers with facilities located throughout the state of New Jersey. CIC member companies produce a variety of materials which are used in the agricultural, pharmaceutical, manufacturing, construction, mining, textile, flavor and fragrance, precious metals and research industries. CIC serves as a spokesperson for its members on important issues of local, state and federal policy. Nearly all of CIC's members are regulated under the Clean Water Act and many have been defendants in citizen suits under section 505 of the Act.

Amicus National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of over 13,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers in the United States and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. Thousands of NAM members and affiliates are regulated under the Clean Water Act and many have been defendants in citizen suits under section 505. Like AISI and CIC, NAM presents the view of its members on issues of law and public policy that concern them.

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are submitted to the appropriate regional office of the EPA and state environmental agencies, who use these reports in evaluating compliance and determining whether enforcement action is necessary. In addition, these monitoring reports are available to the public. 40 C.F.R. § 122.41(l)(4) (1990). NPDES enforcement by private parties (sometimes referred to as "citizen suits") is authorized by § 505 of the Act, 33 U.S.C. § 1365. This case arises under § 505.

Amici also include a number of individual companies in chemical production, oil exploration, production, refining and marketing, pharmaceuticals, production of steel and other metal products, tool and heavy equipment manufacturing, food products, mining, electrical equipment and electric utilities. Each of the individual company *amici* are subject to regulation under the Clean Water Act and has been (or currently is) a defendant in a citizen suit under section 505, or received notice, pursuant to section 505(b)(1)(A), that an environmental organization intends to file such a suit.

Amici are vitally interested in the issues raised by the petition in this case. In the decision below the court of appeals established a standard for standing in Clean Water Act citizens suits. 913 F.2d at 72. The standard is described as one for environmental cases generally. *Id.* at 84, 89 (Aldisert, J., concurring). The decision of the court of appeals disregards decisions of this Court that identify the requisite elements of standing and, as a consequence, violates Article III of the Constitution. The importance of the instant petition transcends the Clean Water Act and presents issues of vital importance to a number of federal environmental laws.

REASONS FOR GRANTING THE WRIT

Article III of the Constitution limits federal judicial power to cases and controversies. To meet that limitation a plaintiff must demonstrate that it has standing to sue. Specifically, to establish standing to sue litigants must show that they have sustained an injury that is fairly traceable to the defendant's unlawful conduct, that is, "'injury in fact' resulting from the action which they seek to have the court adjudicate." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472-73 (1982). In addition to those requirements for injury in fact and causation, the plaintiff must also show that the injury is likely to be redressed by a favorable decision. *Id.*

In the decision below the court of appeals ruled that the plaintiffs had standing to sue. In so ruling the court of appeals announced a new standard for satisfying the causation aspect of standing in Clean Water Act cases. 913 F.2d at 72. Under this new standard the causation requirement is satisfied if a pollutant discharged by the defendant in excess of an NPDES permit limit causes or contributes to the "kinds of injuries" alleged by the plaintiff. *Id.* This standard is a significant relaxation of the causation requirement for standing. *Id.* at 84, 89 (concurring opinion). Influenced by a desire to affirm the district court's imposition of a civil penalty, *see id.* at 84-85, the court of appeals established a precedent that has far reaching implications for expanding standing under the Clean Water Act and other environmental statutes. *See also id.* at 83 (expressing serious concern that decision "will not survive careful Supreme Court review").[2]

A. The Third Circuit Changes This Court's Substantial Likelihood Standard For Causation Into A Mechanical Test That Makes The Absence Of Evidence Of Causation Irrelevant To Standing

The decision below by the district court on liability ruled that a citizen suit plaintiff satisfies the causation aspect of standing merely by showing a violation of an NPDES permit. *Student Public Interest Research Group*

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[2] Although this new standard for causation was accepted by one member of the Third Circuit panel "only on the most questionable of grounds" and "for purposes of this case," 913 F.2d at 83-84, the decision below announced a broad rule that significantly changes the requirements for satisfying the causation aspect of standing in Clean Water Act cases. *But see Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting):

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

of New Jersey, et al. v. P.D. Oil & Chemical Storage, Inc., 627 F. Supp. 1074, 1083 (D.N.J. 1986). A number of district court decisions in Clean Water Act section 505 cases reach the same conclusion. *See e.g., Atlantic States Legal Foundation v. Universal Tool & Stamping Co.*, 735 F. Supp. 1401, 1412 (N.D. Ind. 1990) (causation is presumed if plaintiff shows that defendant violated its NPDES permit); *NRDC v. Outboard Marine Corp.*, 692 F. Supp. 801, 807-08 (N.D. Ill. 1988) (causation is shown by proof of defendant's NPDES permit violations; if more were required the "causation standard would compel a stricter showing for standing than for liability under the Act"); *Student Public Interest Research Group of New Jersey v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1424 (D.N.J. 1985) (defendant would have the court apply a stricter test for standing than for liability itself).[3] While seeming to disagree with the rationale of these district court decisions, including the decision of the district court below that a permit exceedance alone is sufficient to satisfy causation, the court of appeals adopted a very similar approach.

Specifically, the court of appeals cited *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978), for the proposition that to satisfy the causation aspect of standing "plaintiffs need only show that there is a 'substantial likelihood' that defendant's conduct caused plaintiffs' harm." 913 F.2d at 72. The court then announced for Clean Water Act cases a three-part test for causation: (1) a pollutant discharge in excess of an NPDES permit limit (2) to a waterway in which the plaintiffs have an interest that is or may be adversely affected and (3) that pollutant causes or contributes to "the kinds of injuries" alleged by the plain-

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[3] *See also Sierra Club v. Union Oil Co. of California*, 22 ERC 1342, 1344 (N.D. Cal. 1985) ("contrary to defendants' contention, it is not incumbent on plaintiff to demonstrate that its relevant members specifically and causally suffered injury from defendants' alleged violations").

tiffs. *Id.* Further explaining the term "kinds of injuries," the court of appeals said that if the defendant exceeded its permit limit for a pollutant and that pollutant is present in the waterway, causation is established. 913 F.2d at 73 & n.10.

The court of appeals reasoning is incorrect. The Third Circuit turns the "substantial likelihood" standard that this Court applied in *Duke Power* into a mechanical, litmus paper test for standing. *Duke Power's* "substantial likelihood" standard is a factual, case-specific standard rather than the generic, formulistic determination suggested by the court of appeals.

The underlying issue in *Duke Power* was the constitutionality of the Price-Anderson Act, 71 Stat. 576 (codified as amended in scattered sections of 42 U.S.C.), which limits liability in the event of a nuclear power plant accident. The plaintiffs were two organizations and 40 individuals, and their standing to sue was challenged. The plaintiffs asserted various kinds of injuries that they would sustain as a result of the operation of nuclear power plants under construction in close proximity to where the individual plaintiffs lived. The plaintiffs maintained that those injuries were causally related to the Price-Anderson Act: there was a substantial likelihood that without the protection of Price-Anderson the construction of the nuclear plants that plaintiffs viewed as threatening would not proceed. *See* 438 U.S. at 72-75.

As applied by the Court in *Duke Power*, the "substantial likelihood" standard is based on case-specific evidence showing a causal connection between the challenged action and the plaintiffs' injury. *See id.* at 75-77.[4] This reflects the fact that application of the standards that govern standing is not a mechanical exercise. *Allen v.*

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[4] *See also Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 669 (D.C. Cir. 1987) (the facts must show that the challenged action is at least a substantial factor influencing the injury complained of).

Wright, 468 U.S. 737, 751 (1984). Although determining standing in a particular case may be facilitated by rules developed in prior cases,

> [t]ypically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether *the particular plaintiff* is entitled to an adjudication of *the particular claims* asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?

Id. at 752 (emphasis supplied). Moreover, the principles that govern standing to sue do not vary with the circumstances of a given case. *Valley Forge Christian College*, 454 U.S. at 484 ("[W]e know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondents to invoke the judicial power of the United States"). The court of appeals' decision cannot be reconciled with these principles.

In *Lujan v. National Wildlife Federation, et al.*, 110 S. Ct. 3177 (1990), this Court required a nexus between the location of the injury and the conduct or activity causing the injury. In contrast, here the court of appeals reasoned that any plaintiff establishes standing based on an interest in a given waterway that may be affected by the type of pollutant that the defendant discharged to that waterway in excess of a corresponding NPDES permit limit. Under the court of appeals' new rule for standing in Clean Water Act cases it does not matter how far removed the injury and the challenged conduct may be from each other in distance and time.[5] Those factors, which

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[5] *But see Oklahoma et al. v. EPA*, 908 F.2d 595, 607 (10th Cir. 1990) (downstream impact of a particular pollution source will become so attenuated as to be non-detectable).

are the essence of causation in the context of this case, are irrelevant to the court of appeals' new rule.

As justification for relaxation of the requirements for standing the Third Circuit implies that evidence of causation would be difficult to obtain because of the large number of parties discharging to an affected waterway. *See* 913 F.2d at 72 n.8. That suggestion parallels NJPIRG's argument below. *See* Brief of Appellees-Cross-Appellants at 12 n.8, 3d Cir. Nos. 89-5831, 89-5851, 89-5861 (January 10, 1990) (suggesting the impossibility of identifying the injury resulting from an individual discharge). That is a false issue. Far from being impossible, pollutant tracing with computer modeling has become routine.[6] In fact, petitioner submitted such modeling evidence at the trial in this case. This evidence, which was unrebutted, showed that there was not a causal relationship between petitioner's discharge and respondents' injury. Petition for Writ of Certiorari at 5 n.3 (No. 90-867). Concluding, however, that requirements for standing may be relaxed in Clean Water Act cases, the courts below did not address that evidence.

In sum, the court of appeals' new rule for standing in Clean Water Act cases contradicts the standards for constitutional standing previously applied by this Court. The consequence is to transform the federal courts into a vehicle for the vindication of the value interests of concerned bystanders. *Allen v. Wright*, 468 U.S. at 756.

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[6] *See e.g., Oklahoma v. EPA*, 908 F.2d at 607 (noting that computer modeling can predict the extent of a discharger's impact on water quality standards); *Marathon Oil v. EPA*, 830 F.2d 1346, 1348-49 (5th Cir. 1987) (EPA used computer modeling programs to analyze a discharger's impact on water quality standards); *NRDC v. Zeller*, 688 F.2d 706, 714 (11th Cir. 1982) (upholding the validity of an inter-agency agreement requiring the use of modeling to analyze water quality impact).

B. The Issues Raised By The Court Of Appeals' Rule For Standing In Clean Water Act Cases Are Important And Recurring And Transcend The Clean Water Act

The court of appeals' new rule for standing in Clean Water Act cases has considerable importance for Clean Water Act litigation and litigation under a number of other environmental laws. *See* 913 F.2d at 84, 89 (suggesting that relaxed standard for standing applies to environmental cases generally) (concurring opinion).

1. Issues concerning the causation aspect of standing are recurring and prevalent in Clean Water Act citizen suit litigation. In connection with the previous reauthorization of the Clean Water Act,[7] the Senate Committee on Environment and Public Works noted that citizen suits under section 505 had become a substantial portion of Clean Water Act enforcement litigation.[8] That continues to be the case. EPA has in the past maintained a log identifying notices of intent to file suit under section 505. EPA resumed similar recordkeeping during April, 1990, and EPA's Office of Enforcement and Compliance Monitoring estimates that approximately 120 notices of intent to sue under section 505 were received during the months of April-November, 1990.[9] The standing-causation issue underlying the court of appeals' decision is a recurring issue in these cases, and a frequent subject of reported (and unreported) district court and court of appeals decisions under section 505.[10]

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[7] The Water Quality Act of 1987, Pub. L. 100-4, 100 Stat. 7, (February 4, 1987).

[8] S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985).

[9] Telephone interview with Krista Dobby, EPA Office of Enforcement and Compliance Monitoring, Enforcement Division, Washington, D.C. (December 20, 1990).

[10] The issue of whether § 505 plaintiffs have satisfied the causation element of standing has been litigated in a large number of cases. *See Simkins Industries, Inc. v. Sierra Club*, 847 F.2d 1109 (4th Cir. 1988), *cert. denied* 109 S. Ct. 3185 (1989); *Atlantic States Legal Foundation v. Universal Tool & Stamping Co.*, 735

The decision below will serve as a stimulus for increased litigation under section 505. As of December 12, 1990, 84,391 NPDES permits had been issued under the Clean Water Act.[11] As noted earlier (*see* n.1), a violation of an NPDES permit's effluent limitations is reported by the permit holder both to EPA and the appropriate state environmental protection agency and made publicly available. These self-monitoring reports are treated as admissions and are generally sufficient to establish a violation of the Act. *See United States v. Ward*, 448 U.S. 242 (1980). As a result, the plaintiff's case is largely made by the defendant, and a section 505 suit may be brought with relative ease. In addition, plaintiffs have considerable incentive to bring these suits because of the opportunity to direct monetary relief resulting from the suits to environmental organizations and section 505(d)'s provision for recovery of attorneys' fees and expenses.[12]

F. Supp. 1401 (N.D. Ind. 1990); *NRDC v. Outboard Marine Corp.*, 692 F. Supp. 801 (N.D. Ill. 1988); *NJPIRG v Jersey Central Power and Light Co.*, 642 F. Supp. 103, 106-07 (D.N.J. 1986); *NJPIRG v. American Cyanamid*, Civil No. 83-2068 (JWB) (D.N.J. November 6, 1985) (transcript of hearing, at 12-13); *Sierra Club v. Kerr-McGee*, 23 ERC 1685, 1687-88 (W.D. La. 1985); *SPIRG v. AT&T Bell Laboratories*, 617 F. Supp. 1190, 1200 (D.N.J. 1985); *SPIRG v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1423-24 (D.N.J. 1985); *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1546-47 (D.Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *rev'd*, 484 U.S. 49 (1987); *Chesapeake Bay Foundation v. Bethlehem Steel*, 608 F. Supp. 440, 446 (D.Md. 1985); *NJPIRG v. Tenneco Polymers, Inc.*, 602 F. Supp. 1394, 1397 (D.N.J. 1985); *Sierra Club v. Union Oil of California Co.*, 22 ERC 1342, 1344 (N.D. Cal. 1985); *Sierra Club v. Copolymer, Inc.*, Docket 84-407-B (M.D. La. November 15, 1984) (Transcript of oral argument); *SPIRG v. Anchor Thread Co.*, 22 ERC 1150, 1152-53 (D.N.J. 1984).

[11] Telephone interview with Kim Ogden, EPA Office of Water Enforcement and Permits, Permits Division, Washington, D.C. (Dec. 27, 1990) (number derived from internal EPA permit compliance statistics).

[12] A civil penalty of up to $25,000 per day of violation may be imposed in a § 505 suit. *See* 33 U.S.C. § 1365(a); *see also id.* § 1319(d). In many § 505 cases a significant portion of the mone-

The court of appeals' decision is a stimulus to increase section 505 suits by eliminating the requirement for evidence indicating that injury in fact is fairly traceable. *See* 913 F.2d at 88 (concurring opinion). Simply put, by dispensing with the need for evidence of causation, the court of appeals' decision significantly broadens the universe of potential plaintiffs under section 505, with attendant increases in section 505 litigation in the future, all of which is contrary to the requirements for standing under Article III.[13]

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tary relief has gone to environmental organizations. One environmental organization has noted that

> [t]hese citizen suit provisions could be utilized by NYPIRG [New York Public Interest Research Group, Inc.] to punish polluters, gain publicity, steer a significant amount of money to worthwhile environmental projects, and conceivably, to bring in money to NYPIRG in the form of legal fees to attorneys and scientific "experts."

Memorandum from Messrs. R. Weiner, *et al.*, to Executive Comm., NYPIRG (July 19, 1986) (Re: Clean Water Act Citizens Suits). *See also* 913 F.2d at 84 (concurring opinion) ("I see PIRG and FOE in the position of the old-time vaudeville performer's ad in *Variety*: 'Have tux, will travel.' PIRG and FOE advertised: 'Have case, need live-bodied members/plaintiffs' ").

[13] An example further demonstrates this point. Approximately 327 NPDES permittees, which includes industrial facilities and publicly-owned treatment works ("POTWs"), discharge wastewater to the Hudson River between Albany and New York City. Telephone interview with Francis Zagorski, Environmental Engineer, New York State Department of Environmental Conservation, Division of Water, Albany, New York (December 27, 1990). In addition, the POTWs (107 of these permittees are POTWs) will typically serve a considerable number of indirect industrial dischargers (indirect dischargers are also subject to suit under § 505). *See NYPIRG v. Limco Mfg. Corp.*, 697 F. Supp. 608, 609 (E.D.N.Y. 1987). Under the Third Circuit's reasoning a plaintiff who is offended by an oily or greasy sheen on the Hudson River in New York City could chose to sue any one of a great number of upstream dischargers who may have violated a permit limit for oil and grease (oil and grease is a commonly regulated pollutant under EPA's industry effluent standards). *See e.g.*, 40 C.F.R. Parts 408, 417, 423, 425, 432, 433, 463, 464, 468 and 471. This is true no matter how geographically re-

2. The Third Circuit's relaxation of constitutional standing requirements in this case has implications far beyond Clean Water Act citizen suits. Like section 505 of the Clean Water Act, a number of other environmental statutes also authorize private enforcement. This includes section 304 of the Clean Air Act, 42 U.S.C. § 7604 (as amended by section 707 of the Clean Air Act Amendments of 1990, Pub. L. 101-549); section 310 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9659; section 326 of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046; section 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972; and section 20 of the Toxic Substances Control Act, 15 U.S.C. § 2619(a)(1). Each of these provisions authorizes "any person" to commence a civil action against an alleged violator of the underlying environmental statute. The Third Circuit's relaxation of constitutional standing requirements for Clean Water Act citizen suits could be applied to a broad range of similar actions brought under other environmental statutes, permitting plaintiffs to file suit based solely on generalized notions of harm, without proof of causation.

Section 304 of the Clean Air Act exemplifies this concern. This statute has recently been amended to authorize civil penalty relief in citizen suit enforcement. *See* Pub. L. 101-549, § 707(a).[14] Under the court of appeals' reasoning an individual located perhaps hundreds of miles from a source of air emissions would have standing to maintain a suit under section 304 if the air emissions source exceeded its permit limit for a given pollutant

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mote the permittee is from the injury complained of and despite the absence of evidence that the injury is causally linked to the discharger.

[14] Title V of Pub. L. 101-549 establishes a permitting program that will apply to many sources of air pollutants. The new permit program is modeled after the Clean Water Act's NPDES permit program. *See* S. Rep. No. 228, 101st Cong., 1st Sess. 373 (1989).

which also happens to be the same type of pollutant that affects ambient air quality in the plaintiff's locality. *See* 913 F.2d at 72. It would not matter that the presence of the pollutant of concern in the plaintiff's locality was not causally related to the defendant's actions. That is the necessary result of the Third Circuit's reasoning.

In sum, the decision below establishes a rule for standing in Clean Water Act cases that is at odds with the standards previously applied by this Court in resolving issues of constitutional standing. The court of appeals' decision will transcend the Clean Water Act and improperly increase litigation under a number of environmental statutes.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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